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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554  
APR 28 2 15 PM '93

In re Applications of	)	MM DOCKET NO. 93-94 ✓
DISPATCHED BY	)	
SCRIPPS HOWARD BROADCASTING COMPANY	)	File No. BRCT-910603KX
	)	
For Renewal of License of Station WMAR-TV	)	
Baltimore, Maryland	)	
	)	
and	)	
	)	
FOUR JACKS BROADCASTING, INC.	)	File No. BPCT-910903KE
	)	
For a Construction Permit for a New	)	
Television Facility on Channel 2	)	
at Baltimore, Maryland	)	

MEMORANDUM OPINION AND ORDER

Issued: April 26, 1993; Released: April 28, 1993

Background

1. This is a ruling on a Petition For Certification filed on April 8, 1993, by Scripps Howard Broadcasting Company ("Scripps Howard"). An Opposition To Petition For Certification was filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on April 15, 1993. The Mass Media Bureau ("Bureau") filed its Opposition For Certification on April 19, 1993.

2. Scripps Howard requests certification to the Commission under two provisions of the Commission's multiple ownership rules on the question of whether the Bureau erred in setting this case for a hearing under its delegated authority. Four Jacks, the competing applicant for a new television facility on Channel 2, also owns a broadcast facility in the same market.

3. The relevant texts of the rules are as follows:

Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, hearing should be held. If the presiding officer finds that there is substantial doubt, on established policy and undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a statement to that effect. No appeal may be filed from an order denying such a request.

47 C.F.R. §1.106 (a)(2).

Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the Presiding Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable....47 C.F.R. §1.115 (e)(3).

#### Facts And Discussion

4. Scripps Howard seeks dismissal of the Four Jacks application before the litigation starts in earnest. The issues for which certification is sought were previously addressed by the Bureau in its rejection of a pre-designation Petition To Dismiss that was filed by Scripps Howard on May 2, 1992. See Hearing Designation Order DA 93-340, released April 1, 1993, at Para. 3. The Bureau's determination is the law of the case while the case is in litigation before the Presiding Judge and on any initial appeal to the Review Board. See Ft. Collins Telecasters, 103 F.C.C. 2d 978, 983-84 (Review Board 1986) (where there is full consideration of an issue in a designation order the trial judge and the Review Board are without jurisdiction to reconsider it even where the designation was by the Bureau under delegated authority). Cf. Frank H. Yemm, 39 Radio Reg.2d (P&F) 1657 (Comm'n 1987).

4. It was found by the Bureau that the licensee of Station WBFF(TV), Channel 45 at Baltimore, is owned directly by the principals of Four Jacks. Id. The Commission's rules provide that:

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

47 C.F.R. §73.3518 (1992). A renewal application was filed by Channel 45's licensee on June 1, 1991. The application was granted on September 26, 1991. It was in fact a pending application for renewal when Scripps Howard filed its own renewal application on September 3, 1991. The renewal application for WBFF (TV) has been granted. However, the principals of Four Jacks have pledged to divest their interests in WBFF (TV) in the event that Four Jacks receives the grant for Channel 2. The Bureau determined in the designation order that the pledge to divest is sufficient to meet the inconsistent application rule. Scripps Howard also sought dismissal under 47 C.F.R. §73.3555 (1992), the Commission's multiple ownership rule. The Bureau also determined that the divestiture pledge was sufficient to meet the multiple ownership rule as well.

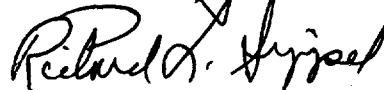
6. The Commission has held that a licensee may apply for a new facility in the same market provided that it agrees to divest the existing license prior to the date on which program tests are made for the new facility. WPOW, Inc., 66 Radio Reg.2d (P&F) 81 - 82 (Comm'n 1986).<sup>1</sup> Scripps Howard relies on the case of Big Wyoming Broadcasting Corp., 2 F.C.C. Rcd 3493 (Comm'n 1987). But that case was decided after WPOW, Inc., supra, and it dealt with two applications for new stations which violated the multiple ownership rules at the time that the applications were filed. The case did not involve an applicant for a new station which made a commitment to divest itself of an existing station. Id. Therefore, the prohibition found by the Commission's holding in Big Wyoming would not apply to Four Jacks.

7. It is concluded that Scripps Howard has not established a sufficient ground to certify an issue to the Commission to determine whether the designation order is erroneous for failing to properly rule on the Commission's rules relating to mutually exclusive applications and multiple ownership of broadcast facilities in the same market. The Commission has delegated the authority to the Bureau to determine whether a hearing is authorized and certification of these questions would be contrary to the efficiencies sought in that delegation.

#### ORDER

Accordingly, IT IS ORDERED that the Petition For Certification filed on April 8, 1993, by Scripps Howard Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>1</sup> Scripps Howard also relies on the earlier case of Southern Keswick, Inc., 34 F.C.C. 2d 624 (Comm'n 1972). There the Commission did find two applications to be mutually exclusive. Id. However, the Commission modified that holding in WPOW, Inc. in order to permit mutually exclusive applications where the two stations may technically co-exist and where there has been a commitment to divest. Four Jacks' proposal qualifies for the latter holding of the Commission and therefore there is no need to certify.